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January 20, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 26, 2003

Case No.: TIA-0031

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility from 1991 to 1994. The OWA referred the application to an independent physician panel, which determined that the applicant's illnesses were not related to her work at DOE. The OWA accepted the panel's determination, and the applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA).

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Those workers include DOE and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). A worker is eligible for an award if the worker was a "member of the Special Exposure Cohort" or if DOL determines that the worker sustained the cancer in the performance of duty. *Id.* The DOL program also provides $50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the

Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not provide for monetary or medical benefits. Instead, it is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program. 2/

The applicant is 57 years old. She worked at a DOE facility as a janitor and material handler for three years - from 1991 to 1994. Since 1995, she has been receiving disability benefits. In her application, the applicant identifies a number of claimed illnesses, which she attributes to working around toxic dusts and chemicals at DOE.

In its report, the physician panel identified ten claimed illnesses: asthma, bronchitis, arthritis, arthritis-knees, herniated disk, fibromyalgia, hypertension, tachycardia, depression, and heavy metal poisoning. The panel addressed each of the illnesses and ultimately found that the worker either did not have the illness or that the illness was not related to exposure to a toxic substance at DOE.

1/ *See* www.dol.gov/esa.

2/ *See* www.eh.doe.gov/advocacy.

The OWA accepted the physician panel's determination. *See* August 29, 2003 Letter from the DOE to the applicant. Accordingly, the OWA determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant contends that the physician panel determination is wrong. She states that "it is believed" that her numerous illnesses are a direct result of her employment at DOE. In response to her appeal, the OHA contacted the applicant to ascertain if she disagreed with specific parts of the determination. She identified a number of disagreements, which are addressed below.

II. Analysis

A. Toxic Substances as Possible Causes of Illnesses

The applicant maintains that the panel determination is inconsistent with the record. She cites documents that discuss various toxic substances and the illnesses that they may cause. Record (R.) at 621-28.

Although the record contains documents that discuss various toxic substances and the illnesses that they might cause, the documents do not warrant a conclusion that the applicant's illnesses resulted from toxic exposures. The panel considers whether the facts presented in a given case indicate that the applicant was exposed to a toxic substance and, if so, whether the exposure was a significant factor in causing, contributing, or aggravating the illness. Accordingly, the showing of a possible relationship between exposure to a toxic substance and an illness is not sufficient to require a positive determination by the physician panel.

As the foregoing indicates, the physician panel process is a case specific process. Accordingly, we turn to the applicant's specific disagreements with the panel determination.

B. Asthma and Bronchitis

The panel found that the applicant had asthma and bronchitis but that the record did not contain evidence of exposures that were a significant factor in causing, contributing to, or aggravating those illnesses. In its discussion of the applicant's illness, the

panel found that the applicant had not reported any shortness of breath at DOE, and opined that the asthma and bronchitis were likely related to the applicant's pre-existing allergies, see R. at 63, and smoking history, see R. at 442.

The applicant maintains that she had sufficient exposures to support a positive determination. The applicant does not point to any specific industrial hygiene records, but states that her work as a janitor involved exposure to toxic dusts and solvents. In addition, the applicant maintains that she reported shortness of breath at DOE. Third, the applicant maintains that she has a minimal smoking history.

The applicant has not demonstrated an error in the panel determination. We find no basis for the first two arguments. The applicant has not identified any specific exposure records supporting her claim, and we did not identify any such records. Moreover, the applicant did not identify any specific records showing that she complained of shortness of breath during her employment at DOE, and the only instance we could identify occurred when she awoke one day with rapid heart beat and slight shortness of breath, went to work, and reported the problem, R. at 467. Finally, although the applicant's health records are contradictory concerning the amount of her smoking, *compare* R. at 442 (½ pack a day for ten years) *with* R. at 34 (occasionally), the panel's discussion of her smoking history was not necessary to its finding: the panel based its finding on the absence of documented exposures. Accordingly, the contradictory evidence about the applicant's smoking history was not "significant contrary evidence" that the panel needed to address. 10 C.F.R. §§ 852.9, 852.12.

C. Fibromyalgia

The panel found that there was no conclusive evidence that the applicant had fibromyalgia. The panel further found that any such fibromyalgia was not work related.

The applicant objects to the finding that there is no conclusive evidence of fibromyalgia. She states that a physician diagnosed her as having fibromyalgia.

The applicant is correct that a physician diagnosed her as having fibromyalgia. R. at 587. Nonetheless, at least one other physician opined that the applicant did not meet the objective criteria for such a diagnosis, R. at 634, and the applicant has not

identified any physician disagreement with that opinion. Accordingly, the panel correctly viewed the evidence as inconclusive. More importantly, the panel's view of the diagnosis as inconclusive did not hurt the applicant: the panel went on to address whether the claimed fibromyalgia was work related and concluded that it was not. The applicant has not pointed to any physician diagnosis to the contrary, and we could find none in the record. Accordingly, the applicant has not demonstrated any error in the physician panel finding concerning fibromyalgia.

D. Heavy Metal Poisoning

The applicant's medical records include the results of hair sample tests during the period November 2000 to March 2001, and an April 2001 hospital stay in which the applicant underwent a procedure to remove heavy metals from the body. The procedure - referred to as chelation - involves intravenous introduction of a chemical that attaches to heavy metals and is excreted in the urine. Although the hospital records show charges for urine tests for heavy metals, there is no record of the results of such tests, and the applicant states that the hospital incorrectly failed to do them. The physician's discharge notes list heavy metal exposure as a diagnosis.

The panel found that there was no evidence of heavy metal poisoning. All of the panel members concluded that the hair sample tests were insufficient to support such a diagnosis. One of the panel members opined that the applicant was chelated without justification and noted the absence of any urine tests for heavy metals or blood tests for lead.

Although the applicant disagrees with the panel's finding, the applicant has not demonstrated a panel error. The physician's discharge notes state a diagnosis of heavy metal exposure, which is not synonymous with heavy metal poisoning. Moreover, there are no urine or blood tests to support a diagnosis of heavy metal poisoning. Accordingly, the applicant has not demonstrated that the physician panel was incorrect when it concluded that the evidence did not indicate heavy metal poisoning.

E. Hearing Loss

The panel did not consider one of the claimed illnesses - hearing loss. The applicant claims that her hearing loss was caused by exposure to noise during her work at DOE.

The OWA did not ask the physician panel to consider the applicant's claim of hearing loss, and that decision was correct. The Act establishes the DOE assistance program for illnesses resulting from "exposure to a toxic substance" at a DOE facility. 42 U.S.C. § 7385o(d)(3). The physician panel rule defines a "toxic substance" as "any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature." 67 Fed. Reg. 2854 (to be codified at 10 C.F.R. § 852.2). The preamble to the rule specifically rejected a proposal that noise be included in the definition of a toxic substance:

> One commenter suggested that noise should be included as a toxic substance. DOE understands that noise can cause harm to workers in certain situations. However, the dictionary defines "toxic" as "of, relating to, or caused by poison or toxin." DOE does not believe that noise operates to poison people because it does not injure by chemical action. Hence, it does not fit comfortably within the ordinary meaning of "toxic substance." Neither the text of Part D nor its legislative history suggests otherwise.

67 Fed. Reg. 52843. Accordingly, the Act's requirement that the illness be caused by exposure to a "toxic substance" excludes hearing loss caused by noise exposure. Accordingly, as we have previously stated, noise-induced hearing loss is not covered by the rule. See *Worker Appeal*, Case No. TIA-13 (January 16, 2003).

Because the applicant has not identified a deficiency or error in the physician panel determination, there is no basis for an order remanding the matter to OWA for a second panel determination. Accordingly, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0031 be, and hereby is, denied.

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 20, 2004